

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

ONE TO ONE NURSING CARE, INC. :  
ORDER

DTA NO.

PROMPT(enter dta number ~806160  
KEYBOARD()For Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1986. :

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KEYBOARD()The Division of Taxation, by its representative, William F. Collins, Esq. (Michael C. Gitter, Esq.), brings a motion, dated August 28, 1991, for an order dismissing the petition pursuant to 20 NYCRR 3000.5(b)(1)(ii) on the ground that the Tax Appeals Tribunal lacks jurisdiction of the subject matter of the petition. Based upon the affirmation of Mr. Gitter in support of the motion and the affirmation of Irving Weintraub, Esq., representing petitioner in opposition to the motion, and all of the pleadings and documents submitted, the following order is rendered.

On or about December 14, 1987, the Division of Taxation ("Division") issued to petitioner a Notice and Demand for penalty in the amount of \$10,000.00, containing the following statement:

"Failure to file wage & tax statement forms IT-2102 or W-2 by the February 28 due date. Penalty is computed at 50.00 for each late filed statement to a maximum penalty of 10,000.00. This penalty has been prorated according to the amounts withheld for each taxing jurisdiction."

The Bureau of Conciliation and Mediation Services ("BCMS") issued a conciliation order, dated October 7, 1988, dismissing petitioner's request for a conciliation conference on the ground that the request was not timely filed. Petitioner filed a petition with the Division of Tax Appeals on October 19, 1988. By letter dated December 8, 1988, BCMS rescinded its original order. A conciliation conference was scheduled in this matter on August 24, 1989. Before the conference was held, petitioner was informed by two letters, dated August 8, 1989 and August

11, 1989 respectively, that there was no "right to protest" a notice and demand in BCMS.

Accordingly, a conciliation conference was never held.

On September 3, 1991, the Division filed the instant motion to dismiss the petition on the ground that the Tax Appeals Tribunal lacks jurisdiction over the subject matter of the petition.

Tax Law § 685 deals generally with additions to tax and civil penalties. The penalty imposed upon petitioner is for failure to timely file certain information returns relating to information at the source, including statements of tax withheld on income, pursuant to Tax Law § 685(h). Tax Law § 685(l) provides in part that:

"Additions treated as tax. -The additions to tax and penalties provided by this section shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as taxes, and any reference in this article to income tax or tax imposed by this article, shall be deemed also to refer to the additions to tax and penalties provided by this section."

In general this means that a notice of deficiency is issued by the Division in order to inform the taxpayer of an asserted penalty. The taxpayer has the right to contest such a notice of deficiency before having to pay it (Tax Law § 689[b]). However, Tax Law § 685(l) provides several exceptions to this general procedure, including an exception for the penalties imposed here under section 685(h). As material here, Tax Law § 685(l) provides:

"For purposes of section six hundred eighty-one [which deals generally with the procedure for issuance of notices of deficiency], this subsection shall not apply to:

\* \* \*

(3) any penalty under subsection (h)".

In these situations the Division can proceed against the taxpayer by the issuance of a Notice and Demand, as it did in this case. Article 22 of the Tax Law does not provide the taxpayer with the right to petition a Notice and Demand.

In Matter of Dreisinger (Tax Appeals Tribunal, July 20, 1989), the Tax Appeals Tribunal held that it has no jurisdiction over penalties properly asserted by notice and demand pursuant to sections 685(l) and 681 of the Tax Law. Petitioner's remedy in these circumstances is to pay

the asserted penalty and file for a refund of the amount paid.

The motion of the Division of Taxation is granted, and the petition of One to One Nursing Care is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE